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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act	)	MM Docket No. 92-260
	)	DOCKET FILE COPY ORIGINAL
Cable Home Wiring	)	

Comments of Charter Communications, Inc. and Comcast Cable Communications, Inc. on the Further Notice of Proposed Rulemaking

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EXECUTIVE SUMMARY

Charter Communications, Inc. and Comcast Cable Communications, Inc. (hereinafter "Charter" and "Comcast") will be affected by the outcome of the Further Notice of Proposed Rulemaking in MM Docket No. 92-260 (hereinafter "FNPRM").

The FNPRM raises three issues: 1) whether loop-through configurations should be subject to the inside wiring rules; 2) if loop-through configurations are made subject to the inside wiring rules, how would those rules work in the real world; and 3) irrespective of the configuration used, whether the premises owner should be permitted to purchase the inside wiring if the subscriber does not.

Charter and Comcast believe that the Commission is attempting to resolve the wrong issues in the FNPRM. Rather, the Commission should focus its efforts on maximizing individual consumer choice irrespective of the type of living arrangement the consumer has selected. Residents in multi-dwelling units (MDUs) should have the same access to the variety of services available to residents in single family homes.

Application of the Commission's current inside wiring rules do not provide residents in rental MDUs or those in condominium associations with bulk service agreements a realistic opportunity to select a multichannel video program distributor ("MVPD") different than the one selected by the owner of the rental MDU or the condominium association.

The FCC can maximize the choices available to residents in MDUs by excluding rental MDUs and condominium association MDUs which have bulk service contracts with the association from the application of the Commission's inside wiring rule. This will permit the cable operator to retain ownership of the wiring. If the rental MDU owner or the condominium association selects a different MVPD from the franchised cable operator, the ownership of the wiring by the cable operator will give residents a choice. If the condominium association or the rental MDU owner purchased the inside wiring, then they would act as gatekeepers and prohibit individual residents from selecting from another service provider.

The ability to select from more than one service provider, and in particular from the franchised cable operator, is especially important in light of the services available from the local cable operator. These operator may offer digital music service or Internet access unavailable from a wireless cable operator or satellite master antenna television system. Charter and Comcast see no reason to deprive those residents who, for whatever reason, do not live in single family dwellings from access to the broadest number of services simply because an alternative MVPD is attempting to obtain access to a MDU without undertaking the capital expenditure of wiring the MDU.

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Pursuant to 47 C.F.R. §§ 1.415, 1.419, Charter Communications, Inc. and Comcast Cable Communications, Inc., through their attorneys, file the following comments in the above-captioned proceeding.

Charter Communications, Inc. (hereinafter "Charter") is a multiple system manager of cable systems throughout the United States. The system's Charter manages serve approximately 900,000 subscribers with many located in multiple dwelling units (hereinafter "MDUs") and would be affected by the changes proposed in the Further Notice of Proposed Rulemaking (hereinafter "FNPRM"). Comcast Cable Communications, Inc. (hereinafter "Comcast") serves roughly 3,400,000 subscribers in 18 states. Charter and Comcast opine that the Commission's FNPRM misses the point entirely. Rather than focusing on the application of its rules to loop-through configurations or whether a premises owners can buy wiring, the FCC should be examining whether it makes sense to apply its inside wiring rules to MDUs.

I. *Introduction*

In 1992, Congress enacted the Cable Television Consumer Protection and Competition Act (hereinafter "1992 Cable Act").[1] Section 16(d) of the 1992 Cable Act, 47 U.S.C. § 544(i), mandates the FCC to "prescribe rules concerning the disposition, after a subscriber terminates service, of any cable installed by the cable operator within the premises of such subscriber."

In this docket, the Commission issued initial regulations establishing a demarcation for inside wiring as that point twelve inches outside of where the cable wires enter the subscriber's premises. 47 C.F.R. § 76.5(mm)(1-2). The demarcation point for MDUs is the same except that it is measured not, from the point that the wiring enters the premises in general, but from the point the wiring enters each individual subscriber unit. *Id.* Any wiring[2] inside the demarcation point is considered inside wiring and subscribers are eligible, upon voluntary termination of service, to purchase that wire at cost. 47 C.F.R. § 76.802.

The Commission's rules do not apply in certain circumstances: 1) if the wiring was installed by someone other than the cable operator or its contractor; 2) if the wiring is treated under state law as a fixture; 3) if the operator treats the wire, for tax purposes, as owned by the subscriber; and 4) if the inside wiring is a loop-through configuration utilized in MDUs. While the exclusions appear to be self-explanatory, the application of the Commission's rules in real world settings, particularly with

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified, as amended at 47 U.S.C. §§ 521-59).

[2] The Commission's order on reconsideration in this docket added passive signal splitters to the definition of inside wiring. MM Docket No. 92-260, First Order on Reconsideration, slip op. at ¶¶ 37-38 (hereinafter "Recon. Order").

respect to rental MDUs, has created much confusion for Charter and Comcast as well as other cable operators.

A number of wireless cable operators, satellite master antenna television system owners (SMATVs), and telephone companies petitioned the FCC to reconsider its original decision in this docket. These entities requested that the Commission modify the demarcation point in order to give multichannel video program distributors (MVPDs) other than the incumbent cable operator greater access to wiring. One alternative MVPD, Liberty, also requested the Commission to authorize the purchase of the loop-through wiring if every person attached to the loop-through system wished to select a different MVPD than the incumbent cable operator.

The Commission rejected these petitions for reconsideration ostensibly because the record did not support modification. Nevertheless, the FCC believed that the alternative MVPDs raised valid points. The Commission instituted this FNPRM to build a record on which it can consider the points raised by the alternative MVPDs. The FCC requested comments on three issues in the FNPRM: 1) whether loop-through configurations should be subject to the inside wiring rules; 2) if loop-through configurations are made subject to the inside wiring rules, how would those rules work in the real world; and 3) irrespective of the configuration used, whether the premises owner should be permitted to purchase the inside wire if the subscriber does not.

II. *Application of the Inside Wiring Rules to MDUs*

Instead of focusing on a relative non-issue[3] -- the ownership of loop-through configurations -- the Commission must resolve the problems associated with applying its inside wiring rules to MDUs. Any resolution of that issue requires the FCC to recognize the difference between various types of MDUs.

A. Condominiums

Some MDUs are condominiums in which residents own their individual dwelling units and have a voice in governance of common areas. In many condominium MDUs, including some in the service territories of Charter and Comcast, the board of the condominium association negotiates a contract for the provision of MVPD service for all the units therein.[4] The negotiations may be with the local cable

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[3] Generally, most cable operators do not use loop-through configurations in new installations. Where loop-through configurations exist, most cable operators make an effort to replace them with a wiring system that enables greater individual choice by each resident in a MDU.

[4] Neither Charter or Comcast believe that bulk service agreements should be banned in MDUs at all, irrespective of their type. First, Charter and Comcast rarely enter into exclusive bulk service agreements and therefore, do not generally deny residents access to alternative MVPD. In contrast, alternative MVPDs often enter into exclusive bulk agreements. If the Commission is concerned about choice, then it should ban, not bulk agreements, but **exclusive** bulk agreements. Second, with respect to condominium units, the residents exercise control over the property through majority voting. Therefore, the residents have a choice by convincing the board or membership that the association should enter into a contract with a specific MVPD.

The residents generally decide to enter into these agreements because the MVPD operator offers a rate which is discounted from the rate that would be charged to individual unit owners. The Commission recognizes the consumer benefits of bulk agreements when by permitting cable operators to offer "bulk discounts to multiple dwelling units. . . ." *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act: Rate Regulation, MM Docket No. 92-266, First Report and Order*, slip op. at ¶ 423.

operator or an alternative MVPD, such as a wireless cable operator or SMATV system owner.

Generally when a condominium association board negotiates a contract for MVPD service, the pro rata cost of the contract is included in the maintenance charges assessed against each individual unit. These agreements generally are referred to as bulk agreements because service is provided to all units in the condominium without individual residents entering into individual contracts with the cable operator.[5] Since the residents are paying for MVPD service, there is a disincentive to these residents to seek another provider of multichannel video programming unless they can break the contract with the first provider or are so dissatisfied with the service that they are willing to pay for an additional service provider.

Residents seeking alternatives to the incumbent bulk service provider will have to incur the additional expense of subscribing to the new service provider. In addition, the new provider might require the subscriber to bear some or all of the cost of installing the necessary wiring and equipment to provide that service. Charter and Comcast estimate that few residents would be willing to bear these additional expenses in order to obtain a new service provider.

Sarasota, Florida exemplifies the problems associated with bulk service agreements for condominium associations. Comcast is the franchised cable operator who has faced competition from alternative MVPDs. For instance, Comcast served

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[5] The bulk agreements usually provide for a base level of service with residents being able to select additional premium or pay-per-view services on an individual basis.

a Sarasota condominium with 110 units under a bulk service agreement. Upon termination, an alternative MVPD entered into a non-exclusive bulk service agreement with the condominium association. Although Comcast was not barred access to the premises, only five of the 110 unit owners requested Comcast's cable service. Comcast, as the former service provider, already had the wiring installed to provide to each unit. Nevertheless, Comcast was unable to win many customers because they would have to pay twice for MVPD service and because it could not price competitively under the uniform rate rules.[8] Comcast believes that it would have been unable to win any customers had it not already had the wiring in place. The existence of the bulk service agreement potentially foreclosed the residents from exercising a realistic choice. The residents' ability to purchase their inside wiring had almost no impact on this choice.

The Commission's rules on inside wiring are designed to allow the resident to select a new provider. In practice, however, it would represent a rare circumstance indeed in which the purchase of the inside wiring would result in the resident having an economically cost-effective choice.

It makes little sense to apply the Commission's inside wiring rules to those situations in which a bulk agreement is currently in effect with a condominium association. Charter and Comcast recommend that the FCC exempt cable operators from the requirements of the inside wiring rule in condominium MDUs subject to a bulk service agreement. The exclusion would lapse once the contract is terminated

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[8] Although the Commission has approved bulk discounts for MDUs, the regulations require that they be made available to all similarly situated MDUs. 47 C.F.R. § 76.984. It is not yet clear whether a cable operator's effort to meet a price offered by an alternative MVPD a specific MDU violates the uniform rate structure rules.

unless the condominium association immediately enters into another bulk agreement with no gap between the two agreements Upon termination or lapse, individual residents would then be able to select an alternative MVPD without having to pay for two services.[7] Charter and Comcast recommend that the Commission modify its rules to exempt cable operators from the inside wiring rules in condominiums that have a valid bulk service agreement with the cable operator.

B. Rental MDUs

Individual subscriber control is an essential element of the FCC's inside wiring rules. The Commission reasons that an individual with control over the inside wiring could find an alternative provider of service at a relatively low cost. The FCC's theory may be very valid for single family dwelling units (including townhouses) and condominium MDUs where residents are actually property owners or have a significant voice in the governance of the property. The Commission's theory is simply untenable in rental MDUs for a variety of reasons.

The vast majority of tenants terminate service with a cable provider upon termination of the leasehold and vacation of the property. That means the tenant is moving out and has no interest in seeking an alternative provider for the service. Nor does the ownership of the wire do the tenant any good upon leaving since the tenant is likely to be moving to some other residence in which the inside

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[7] The absence of a bulk agreement will be an inducement for alternative MVPDs to install the needed wiring and equipment to deliver service at their own expense. These MVPDs recognize that they have a significantly greater chance of winning customers when the residents are not tied to a particular provider through a bulk service agreement.

wiring already exists. Therefore, no economic rationale exists for the vacating tenant to purchase the inside wiring.

Even if the tenant terminates service and decides to remain at the premises, it is highly unlikely that the tenant will be able to obtain an alternative service provider. Absent a statute authorizing a right of entry for cable operators or other MVPD providers,[8] cable operators or other MVPD companies do not have an unfettered right to obtain access to a rental property. Nor does the tenant have the authority to grant access to any part of the property except the individual dwelling unit. Even within each unit, a tenant's right to control or alter the property is severely limited. Therefore, the tenant's purchase of the inside wiring will not, except in rare

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[8] The Commission cites Florida as a state which has an access law applicable to MDUs. The Florida statute has been declared unconstitutional with respect to rental properties. *Storer Cable T.V. v. Summerwinds Assocs., Ltd.*, 493 So. 2d 417, 419-20 (Fla. 1986). A similar access law in Connecticut for rental MDUs was held to be constitutional by the Second Circuit. *Amsat Cable Ltd. v. Cablevision, L.P.*, 6 F.3d 867 (2d Cir. 1993).

However, Florida does have a statute which permits residents of a condominium, whether they are the actual property owners or not, to obtain service from the franchised cable operator even if the condominium has entered into an exclusive bulk service agreement with an alternative MVPD. Fla. Stat. § 718.1232. Other states have similar statutes. *E.g.*, Ill. Rev. Stat. ch. 55, para. 5-1096; Me. Rev. Stat. Ann. tit. 14, § 6041. Cable operators also may gain access to property through state statutes authorizing the operators to use utility easements. *E.g.*, *Edward J. Gay Planting & Mfg. Co. v. Bayou Cable TV, Inc.*, 423 So. 2d 58, 60 (La. App. 1982); *White v. Detroit Edison, Co.*, 263 N.W.2d 367, 369 (Mich. App. 1978).

Access to private property is an important issue to cable operators which Charter and Comcast will address in somewhat more detail in their comments on the Commission's Notice of Proposed Rulemaking in CS Docket No. 95-184. As a general principle, without some sort of broadband access guarantee, residents in rental MDUs may never have the choices available to tenants in condominiums or single family homes.

circumstances, result in the tenant obtaining service from a provider other than the one authorized by the owner or agent of the MDU [8]

Charter's and Comcast's experiences demonstrate that tenants in rental MDUs do not have a realistic choice because the premises owner controls access to the necessary part of the property required to provide service. For example, in the St. Louis, Missouri area, an alternative MVPD contracted with three separate rental MDUs to provide bulk service on an exclusive basis. The contract provided that the tenants only were permitted to receive service from the alternative MVPD. Charter received requests to continue the provision of its cable service to tenants. The property manager denied Charter the right to do so. Had the tenants been able to purchase the inside wiring from Charter, they still only could have received service from the alternative MVPD. The tenants' purchase of the wiring would have been a meaningless and fruitless act in their efforts to retain Charter as their MVPD. Because, Charter was denied access by the property owner. Comcast has faced similar problems in its systems.

Since a tenant upon termination of service is not likely to purchase any inside wiring, the Commission's rules mandate that the cable operator remove the inside wiring or lose control over the wiring. The typical cable operator is not

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[8] For example, the property owner might deny a cable operator access to common areas needed to install equipment for the delivery of service because it has entered into an exclusive bulk service agreement with an alternative MVPD, such as a SMATV operator, who has provided the property owner with some form of compensation for that exclusive bulk agreement. In *Multi-Channel Television v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113 (4th Cir. 1995), the franchised cable operator was denied access to certain rental MDUs because it was unwilling to violate a state statute and pay the property owners a special fee to provide service. A wireless operator, however, made such payments to the property owner.

interested in removing the inside wiring because it is wasteful to do so in MDUs. More importantly, the cable operator expects to provide service to the new tenant. Forcing the cable operator to enter the premises to remove the inside wiring just so that they can reinstall at later date, which may be longer than the seven days allowed to remove the wiring, simply makes no sense. The rule forces the cable operator and subsequent tenants to incur additional expenses for no reason at all and interferes with another primary objective of the 1992 Cable Act -- ensuring that rates for cable service are not unreasonable.

If the cable operator fails to remove the inside wiring within the seven days authorized by the regulations, the Commission's rules do not specify whether the cable operator still owns the wiring. Unless a state has a statute mandating access to MDUs, cable operators generally negotiate either right-of-entry or bulk service contracts with MDU owners in order to gain access to the premises. These contracts usually specify that the cable operator retains ownership of the wiring in the MDU. As a result, the wiring would not be considered a fixture under state real property law.[10]

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[10] Under state common law, the wiring for a cable system would not be considered a fixture. The primary test for determining whether personalty becomes a fixture is the intent of the parties. As a result, a contract specifying ownership of the wires is often determinative of the issue. *E.g.*, *Motorola Communications, Inc. v. Dale*, 665 F.2d 771, 774 (5th Cir. 1982) (interpreting Mississippi law); *Shell Oil v. Capparelli*, 648 F. Supp. 1052, 1055 (S.D.N.Y. 1986) (interpreting New York law); *Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass'n*, 246 S.E.2d 354, 357 (Ga. App. 1978).

One of the tests for determining whether an item is a fixture is whether the parties intended the item to become affixed to the property. Intent generally is ascertained by examining whether the personalty is essential to the purpose for which the realty is used or occupied. Most courts that have considered the issue reach the same conclusion -- wiring for MVPD service is incidental to the primary purpose of the (continued...)

According to the contract with the MDU, the inside wiring belongs to the cable operator. However, under Commission regulations, if the wiring is not removed after seven days, then the cable operator, despite the contract, loses the ability to control the wire. Subsequent to the lapse of the seven-day period, a new tenant moves into vacant unit and commences service with the cable operator. Upon termination of service, can the new tenant purchase the inside wiring from the cable operator if the cable operator lost dominion over the wire under the FCC's inside wiring rules? If not, then who owns the wiring under the Commission's rules, especially if state law does not treat the wires as a fixture.

This situation could be resolved by authorizing the premises owner to purchase the wiring. However, that would defeat the Commission's goal of increasing individual choice to select a MVPD and, instead, would transfer the selection to the owner of the MDU.[11] By retaining ownership of the inside wiring, the cable operator maintains access to the individual units and tenants can select whether they wish to obtain service from the cable operator or the alternative MVPD that contracted with the premises owner. Strict application of the Commission's inside wiring rules to rental MDUs has the perverse effect of potentially reducing subscriber choice not increasing it.

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[10](...continued)
realty which is to house resident. Therefore, the wiring was never intended to be a fixture and ownership is retained by the cable operator. *E.g., Multi-Channel Cable TV Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 553-54 (4th Cir. 1994); *Country Manors Assocs. v. Master Antenna Systems, Inc.*, 458 So. 2d 835, 837 (Fla. 4th DCA 1984).

[11] Charter and Comcast discuss the role of the MDU as a gatekeeper more extensively in their comments filed in CS Docket No. 95 184 which are incorporated by reference.

The Commission can avoid this anomalous result as well as the absurdity of having the cable operator remove and then reinstall inside wiring by simply excluding rental MDUs from the application of the inside wiring rules. Ownership of inside wiring then is governed by state fixture law or the contract entered into between the operator and the owner of the MDU. Confusion between the cable operator and the premises owner is eliminated. Most significantly, the FCC's goal of maximizing consumer choice is achieved.

Excluding rental MDUs from the application of the inside wiring requirements does not constitute an undue burden on alternative MVPD providers. The exemption simply levels the playing field because alternative MVPDs are under no obligation to sell their inside wiring upon termination of service. The alternative MVPDs then avoid the expense of reinstalling inside wiring for a future tenant as a cable operator would be required to do under the Commission's rules. Thus, the alternative MVPD can maintain its "monopoly" control over that specific unit even if tenant did not that wish to obtain service from that alternative MVPD.

The exercise of monopoly control by either the premises owner or an alternative MVPD not only deprives the MDU resident of choice in multichannel video programming but also may deprive them of services that the alternative MVPD cannot provide. For example, some residents may wish to obtain digital music service which the alternative MVPD may not be able to provide. More importantly, cable operators such as Charter and Comcast have begun to experiment with cable modems to provide access to the Internet which requires two-way wireline access -- something completely unavailable from wireless providers. The Telecommunications Act of 1996 recognizes that universal service[12] is an evolving set of ever-more advanced technologies that should be made available to residents in the rural extremities and urban core as well as the suburban middle. Charter and Comcast see no reason to deprive residents of MDUs access to these new technologies simply because an alternative wireless provider seeks access to the premises without providing additional wiring. That would defeat the Congressional goal of access to new telecommunications technologies to all Americans not just those Americans fortunate enough to live in single family housing.

III. *Conclusion*

Charter and Comcast believe that the inside wiring rules work well for single family dwelling units whether they are owner-occupied or tenant occupied.[13] Charter and Comcast believe that the inside wiring rules must not apply to MDUs, of whatever type, except for condominiums in which no bulk service agreement is in effect. Retention of inside wiring ensures that residents of MDUs, particularly, those in rental MDUs, will be able to select from different MVPDs should the premises owner decide to obtain a new service.

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[12] The concept of universal service first was embodied in the Communications Act of 1934. The Commission generally took the view that universal service was necessary to ensure that all Americans had access to "plain old telephone service." The FCC initiated a number of policies designed to ensure universal service including the Universal Service Fund for LECs with high non-traffic sensitive costs and Lifeline Assistance for consumers on low incomes. Both the Commission and the National Telecommunications and Information Administration have undertaken studies in the past decade to examine whether the concept of universal service should be expanded. Congress, by passing the Telecommunications Act of 1996, has settled the question.

[13] To the extent that they are tenant-occupied, the premises owner, not the tenant, should have the right to purchase the inside wiring upon termination.

Charter and Comcast also note that the issues raised in this FNPRM will be affected by the outcome of the Commission's parallel proceeding in CS Docket No. 95-184 on telecommunication service wiring and customer premises equipment. Charter and Comcast also recognizes that both of these proceedings will be dramatically affected by the Telecommunications Act of 1996 and its implementation by the Commission. Charter and Comcast request that the FCC proceed expeditiously, as promised, but not in a manner such that haste takes precedence over logic in developing rules at the dawn of a new frontier in telecommunications.

Respectfully submitted

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